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Nancy Bunn

MORE MEANINGFUL PROTECTION FOR THE RIGHT TO REFUSE ANTIPSYCHOTIC DRUGS

Bee v. Greaves
744 F.2d 1387 (10th Cir. 1985)

NANCY BUNN*

Challenges to the forcible administration of antipsychotic drugs to unconsenting individuals are creating an increasing amount of litigation in federal and state courts. Many courts are now recognizing a federal constitutional right to be free from the forcible administration of antipsychotic drugs. Possible sources of this right include the first[1] and eighth[2] amendments and the due process clauses of the fifth and fourteenth amendments.[3]

Though the existence of an individual's "right to refuse" antipsychotic drugs[4] is gaining general acceptance, courts and commentators continue to disagree as to what standard of review applies when balancing this right against competing state interests.[5] The debate centers around the amount of deference to afford to the professional judgment of state psychiatrists who determine that the forcible administration of antipsychotic drugs is warranted. Additionally, the manner in which courts define this somewhat vague professional judgment standard significantly affects the scope of an individual's right to refuse.[6]

Most of the litigation surrounding the right to refuse involves involuntarily committed inmates of state mental institutions. However, the Tenth Circuit recently considered the issue in pre-trial detainment setting in *Bee v. Greaves*.[7] The *Bee* court recognized a fundamental constitutional right to refuse antipsychotic drugs, but noted that the right is not absolute. The court then proceeded to define the circumstances under

* B.A., History, University of Wisconsin at Madison; candidate for J.D. 11T Chicago-Kent College of Law, 1987.

1. *See infra* notes 20-22 and accompanying text.
2. *See infra* notes 23-27 and accompanying text.
3. *See infra* notes 28-36 and accompanying text.
4. This comment will hereinafter refer to an individual's right to refuse antipsychotic drugs simply as the "right to refuse."
5. *See infra* notes 56-66 and accompanying text.
6. *See infra* notes 102-115 and accompanying text.
7. 744 F.2d 1387 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 1187 (1985).

which a state's interest in forcibly medicating a pre-trial detainee would override the individual's right to refuse.

This comment describes the nature of antipsychotic drugs and their effects on individuals. The theories and history of right to refuse cases will then be examined. Next, the *Bee* court's consideration of pre-trial detainees' right to refuse antipsychotic drugs is discussed. This comment then shows that the opinion in *Bee* gives more meaningful definition to the previously vague professional judgment standard that courts apply in right-to-refuse cases. Finally, the comment concludes that the *Bee* decision serves to provide more meaningful protection of what has been identified as a fundamental liberty interest.

HISTORICAL BACKGROUND

The nature and effects of antipsychotic drugs are an important consideration underlying the court's recognition of an individual's right to refuse these drugs. Antipsychotic drugs[8] first appeared in the early 1950's, replacing insulin, shock and lobotomy as the preferred method of treatment in state mental hospitals.[9] These drugs are frequently prescribed as treatment for certain psychotic conditions including schizophrenic disorders.[10] The precise manner in which antipsychotic drugs work on the brain is not known,[11] although their recognized therapeutic effect is to temporarily relieve many of the symptoms associated with psychotic disorders.[12]

Despite the therapeutic effects that antipsychotic drugs may have on some patients, the potential side effects of these drugs are the major focus

8. Antipsychotic drugs are also referred to as "neuroleptic drugs," and "major tranquilizers." Among the most frequently used of these drugs are Thorazine, Mallaril, Prolixis, and Halodol. *See* Rogers v. Okin, 634 F.2d 650, 653 n.1 (1st Cir. 1980), *vacated and remanded on other grounds sub. nom.*, Mills v. Rogers, 457 U.S. 291 (1982); Davis v. Hubbard, 506 F. Supp. 915, 926-27 (N.D. Ohio 1980).

9. Gelman, *Mental Hospital Drugs, Professionalism, and the Constitution*, 72 GEO. L.J. 1725, 1726 (1984). Associate Professor Gelman was one of the plaintiff's attorneys of record in Reenie v. Klein, 653 F.2d 836 (3d Cir. 1981) (en banc), *vacated and remanded*, 458 U.S. 1119, *on remand*, 720 F.2d 266 (3d Cir. 1983) (en banc); which was one of the seminal cases regarding involuntarily committed mental patients' right to refuse antipsychotic medication.

10. RECH & MOORE, INTRODUCTION TO PSYCHOPHARMACOLOGY, 292, 299 (1971); *see also* Sitnick, *Major Tranquilizers in Prison: Drug Therapy and the Unconsenting Inmate*, 11 WILLAMETTE L.J. 378, 382-83 (1975).

11. For a discussion of the possible ways in which psychotropic drugs, of which antipsychotics are one class, work chemically *see* Comment, *Madness and Medicine: The Forcible Administration of Psychotropic Drugs*, 1980 WIS. L. REV. 497, 498 (psychotropic drugs either increase the level of the neurotransmitter dopamine in the brain or increase the sensitivity of dopamine receptors); *see also* Rhoden, *The Right to Refuse Psychotropic Drugs*, 15 HARV. C.R.-C.L.L. REV. 363, 379 (1980).

12. Psychotropic drugs relieve such symptoms associated with psychosis as hallucination, delusions, belligerance, and extreme agitation or withdrawal. RECH & MOORE, *supra* note 10, at 290; Sitnick, *supra* note 10, at 382; *see also* Gelman, *supra* note 9 at 1741.

in the opposition to their widespread use in mental hospitals and prisons.[13] Some side effects, though temporary, can be very disturbing.[14] However, the greatest concern over the harmful effects of antipsychotic centers around a condition known as tardive dyskinesia. The affliction is painful, disfiguring and sometimes disabling.[15] It is common among mental patients,[16] and at present there is no cure.[17]

In light of the frightening and dangerous side effects that antipsychotic drugs may have, it is not surprising that many mental patients refuse to take the drugs.[18] Many patients' refusals of antipsychotics are met with forcible administration of the drugs, causing them to seek judicial relief, frequently in class action suits for both injunctive relief and money damages.[19] In response to these suits, some federal courts recognize a federal constitutional right to refuse antipsychotic drugs.

13. *See* Rennie v. Klein, 653 F.2d at 843 n.8 ("The risk of serious side effects stemming from the administration of antipsychotic drugs is a critical factor in our determination that a liberty interest is infringed by forced medication."); *see also* Rogers v. Okin, 634 F.2d at 653 n.1; Davis v. Hubbard, 506 F. Supp. at 928 ("Most disturbing, however, is that *all* antipsychotic drugs can cause side effects which are 'as varied and serious as any pharmaceuticals approved for clinical use in the United States'.") (emphasis in original) (citations omitted).

14. Temporary side effects include akathesia, which is a subjective state in which a person experiences a compelling desire to move about constantly. Sometimes antipsychotics have the opposite effect, resulting in a condition known as akinesia, which suppressed mental and physical spontaneity. *See, e.g.*, RECH & MOORE, *supra* note 10, at 299. Other potential side effects include parkinsonian type muscle disorders including masked face, tremors, shuffling gait and drooling. *See, e.g.*, Kline & Angst, *Side Effects of Psychotropic Drugs*, 5 PSYCHIATRIC ANNALS 444, 452 (1975). Still other temporary side effects include dry mouth, sexual dysfunction, blurred vision, constipation and convulsions. For detailed descriptions of the potential temporary side effects antipsychotic drugs may have on motor activity and on a person's physical and mental state, *see* Rennie v. Klein, 653 F.2d at 843-44; Davis v. Hubbard, 506 F. Supp. at 928-29; Sitnick, *supra* note 10, at 383-84; Comment, *supra* note 11, at 530-32.

15. Tardive dyskinesia is characterized by involuntary muscle movements, especially bizarre tongue and mouth movements. It may make swallowing, speaking and breathing extremely difficult and may affect a person's ability to walk and to digest food. *See* Klawans, Goetz & Perlik, *Tardive Dyskinesia: Review and Update*, 137 AM. J. PSYCHIATRY 900 (1980); *see also* Rogers v. Okin, 634 F.2d at 653, n.1; Gelman, *supra* note 9 at 1742-43; Comment, *supra* note 11 at 532-33.

16. Estimates of the rate of occurrence of tardive dyskinesia vary. *Compare* Comment, *supra* note 11 at 533 (tardive dyskinesia affects one half of all chronically hospitalized schizophrenics); *with* Gelman, *supra* note 9, at 1742-43 (estimates vary from 15-20% to as high as 65%). The condition is now recognized by the American Psychiatric Association as a general health problem of major proportions. *Id.* at 1742 n.86.

17. Gelman, *supra* note 9, at 1743; Comment, *supra* note 11, at 533.

18. A refusal by a psychiatric patient to take his or her medication is not necessarily an irrational one. The theory that psychotic patients do not know what is in their own best interests is questionable in light of the fact that some patients who have taken antipsychotics and have improved as a result still refuse drug therapy. Comment, *supra* note 11 at 499. Many of these patients refuse to take the drugs because of their adverse side effects. *See* Van Putten, *Why do Schizophrenic Patients Refuse to Take Their Drugs*, 31 ARCH. GEN. PSYCHIATRY 67, 70-71 (1974).

19. Rennie v. Klein, 653 F.2d 836; Rogers v. Okin, 634 F.2d 650; Davis v. Hubbard, 506 F. Supp. 915.

THE SOURCES OF THE RIGHT TO REFUSE ANTIPSYCHOTIC DRUGS

A possible source of the right to refuse antipsychotic drugs is the first amendment. One court has suggested that the first amendment protects an individual's ability to think, stating that "[a] person's mental processes, the communication of ideas and the generation of ideas, come within the ambit of the First Amendment. To the extent that the First Amendment protects the dissemination of ideas and expression of thoughts, it equally must protect the individual's right to generate ideas."[20] Accordingly, some plaintiffs argue that because antipsychotic drugs inhibit their ability to generate ideas, forcible drugging violates the first amendment guarantee against such intrusions into one's thought processes.[21] Most courts, however, rejected this argument.[22]

Some plaintiffs point to the eighth amendment as a source of the right to refuse antipsychotic drugs. Involuntarily committed mental patients have had little success basing their claims on the eighth amendment's guarantee against cruel and unusual punishment because the Supreme Court has implied that the protections of the eighth amendment are limited to criminal punishment.[23] Though there are persuasive arguments[24] and limited judicial precedent[25] for applying the eighth amend-

20. Kaimowitz v. Department of Mental Health, Civil Action No. 73-19434-AW (Wayne County, Mich., Cir. Ct., July 10, 1973), *quoted in* Shapiro, *Legislating the Control of Behavior Control: Autonomy and the Coercive Use of Organic Therapies*, 47 S. CALIF. L. REV. 237, 258 (1973). One commentator concedes that this "right to generate ideas" is as yet unrecognized by most courts but attributes the "newness" of such an application of the first amendment to the relatively new technologies of mind control. *See* Comment, *supra* note 11, at 505. *But see* Rhoden, *supra* note 11, at 389 for criticism of the notion that courts can rely on the first amendment where restraints on *expression* are not at issue.

21. Davis v. Hubbard, 506 F. Supp. at 933. One federal prisoner stated in his petition for writ of habeas corpus that he had been injected with drugs that "muddle a man's mind preventing him from writing clearly to courts, politicians, or relatives." *See* Peek v. Ciccone, 288 F. Supp. 329, 330 (W.D. Mo. 1968).

22. *See* Rennie v. Klein, 653 F.2d at 844; *see also* Davis v. Hubbard, 506 F. Supp. at 929.

23. *See* Ingraham v. Wright, 430 U.S. 651, 664 (1977). Though the court implied that the Eighth Amendment's application was limited to the prison setting, it also stated:

> Some punishments, though not labeled "criminal" by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify the application of the Eighth amendment. . . . We have no occasion in this case, for example to consider whether or under what circumstances persons involuntarily confined in mental or juvenile institutions can claim the protection of the Eighth Amendment.

Id. at 669 n.37 (citation omitted).

24. *See* Symonds, *Mental Patients Right to Refuse Drugs: Involuntary Medication As Cruel and Unusual Punishment*, 7 HASTINGS CONST. L.Q. 701 (1980). The author argues for the application of the eighth amendment to institutionalized mental patients *even* when drugs are used for therapeutic purposes according to acceptable medical standards. She relies on the judicial trend toward recognizing the arbitrariness of the "treatment vs. punishment" distinction as well as the similarities between institutionalization of mental patients and criminal confinement.

25. *See* Scott v. Plante, 532 F.2d 939, 947 (3d Cir. 1976) (Under certain circumstances, medication of psychiatric hospital inmate with antipsychotic drugs could raise eighth amendment question); Souder v. McGuire, 423 F. Supp. 830, 832 (M.D. Pa. 1976) (involuntary administration of drugs

ment's standards in mental hospital cases, the most recent decisions hold that the eighth amendment is inapplicable in this setting.[26] Unlike involuntarily committed mental patients, prisoners who are forcibly administered with antipsychotic drugs may have a claim for cruel and unusual punishment.[27]

Plaintiffs in right-to-refuse litigation have been most successful when basing their claims on notions of substantive due process. Most courts agree that a person's right to refuse antispychotic drugs implicates a fundamental liberty interest[28] protected by the guarantees of the due process clauses of the fifth and fourteenth amendments.[29] Though the Supreme Court has not specifically ruled on the drug issue, it has held that where such an interest exists, it is best defined as a liberty interest.[30] The precise nature of such a liberty interest is, however, the subject of some dispute.

The First Circuit, in *Rogers v. Okin* identified the right-to-refuse as "part of the penumbral right to privacy, bodily integrity, or personal security."[31] In *Davis v. Hubbard*,[32] the court identified a liberty interest in "bodily integrity,"[33] "making certain kinds of personal decisions,"[34] and

that have painful or frightening side effects can violate eighth amendment); *see also* Knecht v. Gillman, 488 F.2d 1136, 1139-40 (8th Cir. 1973) (use of drugs that induce violent vomitting when inmate violated behavior protocol, if without inmate's consent, violated eighth amendment ban on cruel and unusual punishment).

26. Rennie v. Klein, 653 F.2d at 844; *see also* Youngberg v. Romeo, 457 U.S. 307 (1982) (eighth amendment not applicable in case of involuntarily committed mentally retarded inmate).

27. *See* Nelson v. Heyne, 491 F.2d 352 (7th Cir. 1974), *cert denied*, 417 U.S. 976 (1974) (use of Thorazine and Sparine to control behavior of juveniles at correctional institution violated eighth amendment); *but see* Veals v. Ciccone, 281 F. Supp. 1017 (W.D. Mo. 1968) (inmate forced to take medication that gave him "chest pains and other mental defects" did not state a claim for relief under eighth amendment); Peek v. Ciccone, 288 F. Supp. 329 (W.D. Mo. 1968) (forcible administration of Thorazine to federal prisoner not cruel and unusual punishment even though prisoner not certified psychotic and administration of drugs may have been for inmate's refusal to accept work assignment).

28. The Supreme Court has identified certain "fundamental liberty interests" which are not textually based in the Constitution but are nonetheless protected by the due process clauses of the fifth and fourteenth Amendment. *See, e.g.*, Roe v. Wade, 410 U.S. 113 (1973) (woman's right to privacy in deciding whether or not to have a child); Eisenstadt v. Baird, 405 U.S. 438 (1972) (privacy right in freedom to make marital and family decisions); Stanley v. Illinois, 405 U.S. 645 (1972) (privacy interest in family autonomy); Meyer v. Nebraska, 262 U.S. 390 (1923) (liberty interest in making educational decisions).

29. Rennie v. Klein, 653 F.2d 836, 841 n.6; Rogers v. Okin, 634 F.2d 650, 653; Davis v. Hubbard, 506 F. Supp. 915, 929.

30. Mills v. Rogers, 457 U.S. 291, 299 n.16.

31. 634 F.2d at 653.

32. 506 F. Supp. 915.

33. *Id.* at 930-32 (relying on the common law of torts, the specific guarantees underlying the fourth and eighth amendments, and the due process clauses of the fifth and fourteenth amendments).

34. *Id.* at 931-32 (relying on the tort doctrine of informed consent and on Griswold v. Connecticut, 381 U.S. 479 (1965) and its progeny).

in "being able to think and communicate freely."[35] Though the exact source of such a liberty interest is disputed, it is nevertheless generally agreed that the due process clauses are implicated in right to refuse cases.[36]

COMPETING STATE INTERESTS

Regardless of the exact source of the right, courts which recognize the right of an individual to refuse antipsychotic drugs also agree that this right is not absolute. Instead, the right of the individual must be balanced against legitimate governmental interests in forcibly medicating the individual.[37] A state's interest in forcibly medicating an involuntarily committed mental patient derives from one of two sources of power: the *parens patriae* theory or the state police power.[38]

Under the *parens patriae* theory the state asserts that its interest in treating the mentally ill derives from its power to act as "the general guardian of all infants, idiots and lunatics."[39] Though this interest in treating incompetents may be legitimate under some circumstances, mental illness cannot always be equated with incompetence.[40] Even a state finding of incompetence that accompanies involuntary commitment does not necessarily mean that that person is incompetent to make treatment decisions for him or herself.[41] Therefore, some courts conclude that unless the state is faced with an emergency situation,[42] there should be a determination that an individual lacks the capacity to make treatment decisions *prior to* any forcible administration of antipsychotic

35. 506 F. Supp. at 933. Though other courts and commentators have discussed this interest in terms of a first amendment right, this court declined to do so, stating "[i]t is enough to observe that 'the power to control men's minds' is 'wholly inconsistent' not only with the 'philosophy of the first amendment but with virtually any concept of liberty.' " *Id.* (citation omitted).

36. Mills v. Rogers, 457 U.S. at 299, n.15 ("In this Court petitioners appear to concede that involuntarily committed mental patients have a constitutional interest in freedom from bodily invasion."); Rogers v. Okin, 634 F.2d at 654 ("None of the parties or *amici* in this suit contest the correctness of this general proposition.").

37. Rennie v. Klein, 653 F.2d at 844-45; Davis v. Hubbard, 506 F. Supp. at 934.

38. Rennie v. Klein, 653 F.2d at 845; Rogers v. Okin, 634 F.2d at 654; Davis v. Hubbard, 506 F. Supp. at 934-35.

39. Rogers v. Okin, 634 F.2d at 657 (*quoting* Hawaii v. Standard Oil Co., 405 U.S. 251, 257 (1972)).

40. [T]he overwhelming majority of the patients at LSH are quite capable of rationally deciding whether it is in their best interests to take or to stop taking psychotropic drugs . . . Though they may each suffer from emotional disorders, there is no necessary relationship between mental illness and incompetency which renders them unable to provide informed consent to medical treatment.

Davis v. Hubbard, 506 F. Supp. at 935 (citations omitted).

41. *See* Rogers v. Okin, 634 F.2d at 657-59 (Massachusetts commitment proceedings alone do not provide predicate to forcible administration of drugs).

42. The state's power to forcibly administer antipsychotic drugs in an emergency situation is discussed *infra* at notes 52-57 and accompanying text.

drugs[43] on the basis of the state's *parens patriae* power.

Precisely *how* the determination of a person's capacity to refuse antipsychotic medication should be made is a question of procedural due process. The procedural due process issue is most significant when the state wishes to impose a prolonged course of treatment with antipsychotic drugs on an unconsenting individual. In *Mathews v. Eldridge*,[44] the Supreme Court adopted a three-part test to guide courts in deciding the minimum procedural safeguards due before the government may deprive an individual of a constitutionally protected interest. In addition to these minimum federal standards, states may provide procedural protections that extend beyond the procedures required by the constitution.[45] Therefore, the procedures which state officials must follow in determining whether a person is incompetent to consent to treatment may vary from state to state.

In *Rennie v. Klein*,[46] the Third Circuit held that a decision to forcibly medicate an individual who has not been declared incompetent to consent to treatment is valid if certain administrative procedures are followed.[47] The First Circuit, however, held in *Rogers v. Okin*[48] that due process would require both an initial determination of incapacity to consent to treatment and certain procedural guarantees following the decision to forcibly medicate.[49] Finally, in *Davis v. Hubbard*,[50] the district

43. [T]he *sine qua non* for the state's use of its *parens patriae* power as justification for the forceful administration of mind affecting drugs is a determination that the individual to whom the drugs are to be administered lacks the capacity to decide for himself whether he should take the drugs.

Rogers v. Okin, 634 F.2d at 657 (citation omitted); *see also* Davis v. Hubbard, 506 F. Supp. at 936, n.27 and accompanying text.

44. 424 U.S. 319 (1976). In addressing a procedural due process claim, courts should consider: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335 (citation omitted).

45. Mills v. Rogers, 457 U.S. at 300.

46. 653 F.2d at 836.

47. *Id.* at 851. The Third Circuit held that the procedures established in New Jersey's Administrative Bulletin 78-3 were constitutionally adequate for deciding when to forcibly medicate a person who had *not* been declared incompetent in a judicial proceeding. Briefly, the scheme established a three-step, institutional review of a decision to forcibly medicate that included the patient, the treating physician, the entire "treatment team" and finally the institution's medical director. Ultimately, the medical director could make the decision to forcibly medicate an individual if he or she agreed with the treating physician's opinion. *Id.* at 848-49.

48. 643 F.2d 650.

49. *Id.* at 657. The First Circuit held that the state's exercise of its *parens patriae* powers to forcibly medicate an individual must be preceded by a determination that the individual lacks the capacity to decide for himself whether he should take the drugs. *Id.* Though the court did not imply that fullblown competency proceedings were required, *Id.* at 659, it also stated that commitment

court, while declining to decide the question, suggested that "some kind of" prior hearing should take place before forcibly medicating an individual with antipsychotic drugs.[51] Though the standards of procedural due process may vary, it appears that there must be *some* procedural protections before a state can forcibly administer antipsychotic drugs to an involuntarily committed mental patient on the basis of its *parens patriae* power.

In contrast to the procedural protections that must accompany a state's assertion of its *parens patrie* power, a state's assertion of its inherent police power in an emergency is understandably less limited by procedural due process requirements.[52] Most courts recognize that the state has a legitimate interest in protecting a patient from harming himself or others.[53] Thus, it is generally agreed that in an emergency situation, where a mental patient poses a safety threat, the state may have a legitimate interest in forcibly administering antipsychotic drugs.[54] A state's assertion of its police power should depend, however, in the first instance upon the existence of an emergency.[55]

When addressing a state's emergency powers, courts begin to disagree as to the standard of review to apply to a state's decision to forcibly medicate. Whereas some courts encourage judicial review of whether or

proceedings alone were not enough. *Id.* at 658. Furthermore, the *Rogers* court suggested that following a determination of incompetency to make treatment decisions, there should be periodic review by a non-treating physician of a patient being forcibly medicated. Such review would ensure that the treating physicians are in fact attempting to make treatment decisions as the patients themselves would, were they competent. *Id.* at 661.

50. 506 F. Supp. 915.

51. *Id.* at 938. Since none of the parties to the suit had raised the procedural due process issue the court could not decide the issue but it did offer "certain general observations on the question as a guide to the parties." *Id.* The court suggested that a prior hearing would be appropriate in most situations. It suggested, however that due process would not necessarily require that the impartial decision maker come from outside the institution. *Id.* at 939.

52. "While a prior hearing may be required in most circumstances, it certainly is not required in all. Due process, for instance, has generally not required the State to conduct a prior hearing when confronted with an emergency." Davis v. Hubbard, 506 F. Supp. at 939 (Citing Goss v. Lopez, 419 U.S. 565, 582-83 (1975); Bowles v. Willingham, 321 U.S. 503 (1944); North American Cold Storage Co. v. City of Chicago, 211 U.S. 306 (1908)).

53. Rogers v. Okin, 634 F.2d at 654; Davis v. Hubbard, 506 F. Supp. at 934.

54. Rogers v. Okin, 634 F.2d at 654; Davis v. Hubbard, 506 F. Supp. at 934; *see also*, Osgood v. District of Columbia, 567 F. Supp. 1026, 1030 (D.D.C. 1983) (emergency situation in prisons may justify forcible administration of antipsychotic drugs); Gilliam v. Martin, 589 F. Supp. 680, 682 (W.D. Okla. 1984) (same).

55. *See* Davis v. Hubbard, 506 F. Supp. at 934:

> Given the significant invasion of the fundamental interests that the forced use of psychotropic drugs represents, the risk of danger which the State has a legitimate interest in protecting against must be sufficiently grave and imminent to permit their coerced use. The focus must therefore be in the first instance on the existence of danger . . . since it is this which justifies the coercive power of the State.

Id. (footnote omitted).

not an emergency actually existed at the time a person was forcibly drugged[56] other courts have determined that psychiatrists at state mental institutions are entitled to complete deference in their determination that an emergency existed.[57]

Furthermore, there has been some disagreement as to how strictly courts should scrutinize a state's choice to use antipsychotic drugs, as opposed to some other measures, in an emergency situation. In the past, the Supreme Court required that the state choose the least intrusive means possible when infringing on a fundamental constitutional interest.[58] The application of the doctrine is "motivated by a recognition of a duty to afford individuals the full protection of their constitutional rights, even where the state has convinced the court that some infringement on those rights is justified."[59] Yet courts do not uniformly impose this least restrictive alternative test where mental patients have claimed the right to be free from the forcible administration of antipsychotic drugs.[60]

The debate over the application of a more or less stringent standard of review is best illustrated in *Rennie v. Klein*.[61] In that opinion, a majority of the Third Circuit, sitting en banc, held that protection of the mental patient's liberty interest in being free from forced drugging required that the state consider the "least intrusive infringement."[62] Yet Circuit Judge Garth, in a lengthy concurring opinion, forcefully rejected

56. *See Id.* at 934-35 ("[I]t is not enough that the patient has at some time been violent. . . . As a constitutional minimum, . . . the State must have at least probable cause to believe that the patient is *presently* violent or self-destructive. . . .")

57. *See* Rogers v. Okin, 634 F.2d at 654-57. The First Circuit rejected the district court's ruling that an emergency existed only where there was a "substantial likelihood of physical harm to the patient, other patients, or to staff members." *Id.* at 655. Instead, the First Circuit held that the courts should "leave this difficult, necessarily *ad hoc* balancing to state physicians. *Id.* at 657.

58. The Court applied the least restrictive alternative doctrine to protect an individual's right to privacy in Griswold v. Connecticut, 381 U.S. 479 (1965). It has also applied the doctrine to protect an individual's first amendment rights in Shelton v. Tucker, 364 U.S. 479 (1960). Both of these interests may be implicated where an individual maintains a right to refuse antipsychotics. *See supra* notes 20-22 and 28-36 and accompanying text; *see also* Comment, *The Scope of the Involuntarily Committed Mental Patient's Right to Refuse Treatment With Psychotropic Drugs: An Analysis of the Least Restrictive Alternative Doctrine*, 28 VILL. L. REV. 101 129-148 (1983) (author argues that the least restrictive alternative doctrine should apply in this context).

59. Comment, *supra* note 58, at 131.

60. The court in Davis v. Hubbard declined to decide whether the state must use the least restrictive alternative upon a finding of an emergency. It stated that a finding of *present* danger "of course, does not mean that the patient found dangerous must be drugged or can be drugged excessively. These questions, however, concern the State's obligation to provide the least restrictive treatment and are not considered." 506 F. Supp. at 935 n.24.

61. 653 F.2d 836.

62. *Id.* at 845. The court in *Rennie* did not decide the issue based upon the existence of an emergency but instead applied the standard to a prolonged program of treatment. It recognized that an emergency situation would possibly "require that more discretion be granted the attending physician." *Id.* at 847.

the least restrictive alternative standard[63] and predicted that the Supreme Court would do the same.[64]

Rennie went to the Supreme Court where the judgment was vacated and remanded for consideration in light of its decision in *Youngberg v. Romeo*.[65] The Third Circuit interpreted the remand instructions to mean that the Supreme Court declined to adopt the least restrictive alternative test. The *Rennie* court therefore abandoned the stricter standard of review in favor of that standard of review enunciated in *Youngberg*. Applying the *Youngberg* standard, the Third Circuit held that a state official's decision to forcibly administer antipsychotic drugs does not violate an individual's right to refuse unless "the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[66] The *Rennie* court therefore adopted a standard of review that defers almost completely to professional judgment by defining professional judgment as any decision that does not deviate substantially from accepted norms.

Since the *Rennie* decision, two other cases involving the right to refuse antipsychotic drugs have been decided. In *Osgood v. District of Columbia*,[67] the court held that a convicted prisoner's complaint that she was forcibly drugged with an antipsychotic drug stated legally sufficient claims under the due process clause of the fifth amendment and the free exercise clause of the first amendment.[68] In its decision, the court stated that an emergency situation would justify forced drugging with antipsychotics "only where there is no reasonable alternative action that is less intrusive."[69] Although the court initially invoked this strict stan-

63. "[I]n my opinion, any attempt to construct a 'least restrictive' constitutional standard in an area where medical judgment should control is unsound, unworkable and unwarranted." 653 F.2d at 861 (Garth, J., concurring).

64. "Logic would indicate that the likelihood of the survival of "least restrictive" as a constitutional standard is slight indeed." *Id.* at 863.

65. Rennie v. Klein, 458 U.S. 1119 (1982). In Youngberg v. Romeo, 457 U.S. 307 (1982), the Supreme Court considered the substantive rights of involuntarily committed mentally retarded persons. The Court agreed with the Third Circuit that such individuals retain liberty interests in freedom from bodily restraint and in personal security but held that the standard of review of state action under the circumstances was somewhat lower than the "compelling" or "substantial" necessity tests. *Id.* at 321-22.

66. Rennie v. Klein, 720 F.2d 266, 268 (quoting Youngberg v. Romeo, 457 U.S. 307, 323).

67. 567 F. Supp. 1026 (D.D.C. 1983).

68. *Id.* at 1033. Ms. Osgood's claim under the free exercise clause arose out of the fact that, as a Christian Scientist, the administration of the drugs violated her religious beliefs.

69. *Id.* at 1031. It is interesting to note that the court's decision to apply the least restrictive alternative test was made despite its awareness that the Supreme Court had remanded *Rennie* for consideration in light of Youngberg v. Romeo. The court stated, "*Youngberg* did not cast doubt upon any of the reasoning of *Rennie* referred to in this Memorandum Opinion, as that case does not

dard of review, it later tempered its decision with the admonition that, "in resolving these issues [the existence of an emergency and the availability of less restrictive alternatives], some deference must be afforded to the findings of the professionals, involved."[70]

In *Gilliam v. Martin*,[71] the district court dismissed a petitioner's petition for writ of habeas corpus where the prisoner claimed that he was being forced to take antipsychotic drugs in violation of his due process rights and his right to be free from cruel and unusual punishment.[72] In so doing, the court not only declined to impose a least restrictive alternative test, but stated that, in an emergency, prison officials have a duty to protect correctional officers and inmates from violent prisoners using "whatever measures are appropriate."[73] Thus, it appears that a significant controversy over the applicable standard of review in right to refuse cases existed prior to the Tenth Circuit's decision in *Bee v. Greaves*.[74]

FACTS OF THE CASE

Daniel Bee was a pre-trial detainee in Salt Lake County jail who requested the antipsychotic drug Thorazine six days after his booking. Bee had been hallucinating and had threatened to kill himself if he did not receive the drug.[75] The jail placed Bee in isolation and had him evaluated by the jail psychiatrist who prescribed Thorazine.[76]

Bee was then transferred to the Utah State hospital for an evaluation of his competency to stand trial. During that time he was diagnosed schizophrenic by a state psychiatrist and was once again prescribed Thorazine.[77] Approximately one month later, Bee was returned to the jail, having been certified competent to stand trial.[78] The judge at the competency hearing ordered Bee medicated with Thorazine daily.[79]

Following a month of voluntary medication, Bee began to complain

discuss the right to refuse treatment." *Id.* at 1031-32 n.1. *See supra* note 65 for a discussion of *Youngberg*.

70. 567 F. Supp. at 1036.

71. 589 F. Supp. 680 (W.D. Okla. 1984).

72. *Id.* at 681. Though the petitioner originally filed a writ of habeas corpus, the court construed his *pro se* pleading as a request for damages. *Id.*

73. *Id.* at 682.

74. 744 F.2d 1387 (10th Cir. 1984), *cert. denied*, 105 S. Ct. 1187 (1985).

75. *Id.* at 1389.

76. *Id.*

77. *Id.*

78. The psychiatrist wrote a letter to the court stating that Bee was "competent to stand trial at this time in that he has the ability to comprehend the nature of the charges against him and the punishment specified for the offense charged and has the ability to assist his counsel in his defense." *Id.*

79. *Id.*

that he was having trouble with the drug. He refused treatment with Thorazine for five days until the jail psychiatrist ordered him forcibly medicated whenever he refused to take it orally. Following one instance of forcible intramuscular injection of Thorazine, Bee took the medication orally under the continued threat of another forcible injection.[80]

Bee then filed an action for damages against several employees of the Salt Lake County Jail under 42 U.S.C. § 1983.[81] He alleged that the administration of Thorazine against his will violated his rights under the due process clause of the fourteenth amendment. The district court granted the defendants' motion for summary judgment.[82] The Tenth Circuit reversed and remanded, holding that there were disputed factual issues precluding summary judgment.[83]

THE COURT'S REASONING

The court noted at the outset that pre-trial detainees retain certain constitutional rights.[84] The court then recognized that a pre-trial detainee has a liberty interest in freedom from forcible administration of antipsychotics founded in the right to privacy,[85] the right to be free from bodily restraint,[86] and the right to be free from "unjustified intrusions on personal security."[87] In addition, the court agreed with Bee that the forcible administration of antipsychotic drugs raised first amendment con-

80. *Id.* at 1389-90.

81. *Id.* at 1389. Bee named as defendants the sheriff, the jail's director of security, the supervisor of the jail, the jail physician, a psychiatrist employed by Salt Lake County Mental Health and several county commissioners.

82. *Id.* at 1389.

83. *Id.* at 1395.

84. *Id.* at 1391. The *Bee* court relied on Bell v. Wolfish, 441 U.S. 520 (1979); where the Supreme Court, after recognizing that prisoners retain certain constitutional rights, stated, "[a] *fortiori*, pre-trial detainees, who have not been convicted of any crimes, retain at least those constitutional rights that we have held are enjoyed by convicted prisoners." 441 U.S. at 545.

85. 744 F.2d at 1392. The court recognized this as a "fundamental personal right" derived from "the teachings of history [and] solid recognition of the basic values that underlie our society." *Id.* (citations omitted). The *Bee* court relied on the analysis of Davis v. Hubbard, 506 F. Supp. 915, where that court recognized the basis of this fundamental right in the tort doctrine of informed consent. 744 F.2d at 1392. The court found additional support for the recognition of a privacy right in Whalen v. Roe, 429 U.S. 589 (1977) where a unanimous Supreme Court noted a privacy interest in "independence in making certain kinds of important decisions." 429 U.S. at 599-600.

86. 744 F.2d at 1393. The court derived this possible basis for a liberty interest from Youngberg v. Romeo, 457 U.S. 307 (1982). The *Bee* court reasoned, "If incarcerated individuals retain a liberty interest in freedom from *bodily* restraints of the kind in *Romeo* then a fortiori they have a liberty interest in freedom from physical and mental restraint of the kind potentially imposed by antipsychotic drugs." *Id.* (citation omitted) (emphasis in original).

87. 744 F.2d at 1393 (*citing* Vitek v. Jones, 445 U.S. 480 (1980)). The court stated that *Vitek* was most relevant to the case in that it involved the treatment of an allegedly unstable prisoner. In *Vitek*, the Supreme Court held that a prisoner could not be involuntarily transferred to a mental hospital without due process protections, including notice, a hearing and an independent decision maker.

cerns.[88] Having recognized the existence of a fundamental liberty interest, the court proceeded to balance that interest against competing state concerns.

Prior to balancing the interests however, the *Bee* court noted the admonitions of the Supreme Court that prison administrators be accorded wide-ranging deference in maintaining prison order and that "[i]n the absence of substantial evidence in the record to indicate that the officials have *exaggerated their response* to these considerations, courts should ordinarily defer to their expert judgment in such matters."[89] The court then proceeded to examine the state's asserted interests in light of these admonitions.[90]

Initially, the court held that the state's asserted duties to treat a mentally ill detainee and to maintain him in a competent condition to stand trial were not legitimate state concerns.[91] Next, the court held that though jail safety and security *are* legitimate state concerns, the forcible administration of antipsychotic drugs was not reasonably related to the goal of jail safety absent an emergency.[92] The court also held that if no emergency existed, state law would prohibit the forcible administration of antipsychotic drugs unless there had been a judicial determination of incompetence to consent to treatment.[93]

The court then stated that whether emergency warrants the nonconsensual use of antipsychotics will depend on a "professional judgment-call" by the appropriate medical authorities applying accepted medical

88. 744 F.2d at 1394. The court stated, "The First Amendment protects the communication of ideas, which itself implies protection of the capacity to produce ideas. . . . Antipsychotic drugs have the capacity to severely and even permanently affect an individual's ability to think and communicate." *Id.* at 1394-95 (citations omitted). The court also pointed to a passage in Stanley v. Georgia, 394 U.S. 557 (1969) to support its holding that the First Amendment applied in this case:

> In a society whose 'whole constitutional heritage rebels at the thought of giving government the power to control men's minds,' the governing institutions, and especially the courts, must not only reject direct attempts to exercise forbidden domination over mental processes; they must strictly examine as well oblique intrusions likely to produce, or designed to produce, the same result.

744 F.2d at 1394 (quoting Stanley v. Georgia, 394 U.S. 557, 565 (1969)).

89. *Id.* at 1394 (quoting Bell v. Wolfish, 441 U.S. at 547-48 (emphasis in original)).

90. 744 F.2d at 1394.

91. *Id.* at 1395. Regarding the state's constitutional duty to treat the medical needs of pre-trial detainees, the *Bee* court stated, "This constitutional requirement cannot be turned on its head to mean that if a competent individual chooses not to undertake the risks or pains of a potentially dangerous treatment, the jail may force him to accept it." *Id.* As to the state's asserted interest in keeping Bee competent to stand trial the court said, "The needs of the individual, not the requirements of the prosecutor, must be paramount where the use of antipsychotic drugs is concerned." *Id.*

92. *Id.*

93. *Id.* The court pointed out that under Utah law, a mentally ill person could not be subjected to involuntary mental treatment absent a judicial determination that he was incompetent to consent to treatment. *See supra* notes 44-51 and accompanying text for differing state views of the procedures required before a person may be treated without his consent.

standards.[94] "It requires an evaluation in each case of all the relevant circumstances, including the nature and gravity of the safety threat, the characteristics of the individual involved, and the likely effects of particular drugs."[95] The court further stated that once an emergency has been determined to exist, the state should consider less restrictive alternatives before resorting to the forcible administration of antipsychotic drugs.[96] The *Bee* court expressly recognized the Supreme Court's rejection of the least restrictive alternative analysis in *Youngberg*,[97] but distinguished that case "both because it involved temporary physical restraints rather than mental restraints with potentially long term effects . . . and because Romeo had been certified as severely retarded and unable to care for himself."[98]

The court concluded that since the record revealed a disputed fact issue as to whether or not an emergency existed,[99] the district court had erred in granting summary judgment for the respondents. Furthermore, the court stated that, even if it were found that an emergency did exist, "there was a material issue of fact as to whether forcible medication for an *indefinite period* was an 'exaggerated response" in this case."[100] The case was therefore remanded to the district court for further consideration.[101]

ANALYSIS

Currently, there is little debate that the right to refuse antipsychotic drugs is a fundamental liberty interest protected by the due process clauses of the fifth and fourteenth amendments. Instead, the controversy surrounds the issue of what standard of review to apply in these cases. Courts disagree as to the amount of deference to afford state psychiatrists who, in the exercise of their professional judgment, determine that an emergency warrants overriding an individual's right to refuse antipsychotic drugs.

Much of the controversy surrounding the various possible standards

94. *Id.* at 1395-96.

95. *Id.* at 1396.

96. *Id.* Thus, the court stated that segregation of the prisoner or the use of less controversial drugs like tranquilizers or sedatives "should be ruled out before resorting to antipsychotic drugs." *Id.*

97. *See supra* notes 65-66 and accompanying text.

98. 744 F.2d at 1396 n.7.

99. *Id.* at 1396. Though the jail psychiatrist had testified that Bee had become assaultive at the time of the forcible injection, the jail medic who administered the Thorazine testified that Bee was not acting unusually and was not out of control. *Id.* at 1389 n.1.

100. *Id.* at 1396-97. (citation omitted) (emphasis in original).

101. *Id.* at 1397.

of review actually centers around the meaning of the term "professional judgment." A court cannot defer to or scrutinize professional judgment unless it first defines what it means by that term. Courts must therefore seek to "give an operative meaning to this somewhat amorphous 'professional judgment' standard."[102] This is precisely what the decision in *Bee* accomplished. In its opinion, the *Bee* court fashioned a more concrete definition of the otherwise vague professional judgment standard and in doing so, provided more meaningful protection to individuals asserting the right to be free from the forcible administration of antipsychotic drugs.

In the second *Rennie* decision,[103] the Third Circuit adopted the definition of the professional judgment standard enunciated by the Supreme Court in *Youngberg v. Romeo*.[104] According to *Youngberg*, professional judgment is loosely defined as any decision by a professional[105] that is not a "substantial departure from accepted professional judgment, practice, or standards."[106] When professional judgment is defined in such a broad manner, it reduces the right to refuse antipsychotic drugs to no more than a right to receive professional medical treatment.[107] As such, this view of what constitutes professional judgment has been understandably criticized.[108] The standard creates a presumption that the decision to forcibly administer antipsychotics is valid,[109] and effectively bars judicial review of the decision unless the plaintiff can meet the heavy burden of rebutting the presumption by proving a "substantial departure" from accepted practices.

102. Rennie v. Klein, 720 F.2d at 271 (Adams, J., concurring).

103. 720 F.2d 266.

104. *See supra*, notes 65-66 and accompanying text.

105. In *Youngberg* the Court defined a "professional" decisionmaker as "a person competent, whether by education, training or experience, to make the particular decision at issue." 457 U.S. at 323 n.30. The court further stated that long-term decisions should be made by persons with degrees in medicine or nursing, whereas day-to-day decisions would necessarily be made in many instances by employees without formal training. *Id.* If this were in fact the standard that the Supreme Court would apply in right to refuse cases, the Court would in effect be allowing non-medical personnel to make a decision to administer antipsychotic drugs.

106. Rennie v. Klein, 720 F.2d at 269 (quoting Youngberg v. Romeo, 457 U.S. at 323).

107. *See* Gelman, *supra* note 10 at 1732. The author states that when such a standard is used, "a substantive constitutional liberty right becomes no more than an entitlement to professional judgment concerning one's biological or medical well-being; and the constitutional guarantee of due process is deemed satisfied by whatever medical judgment happens to be recognized in the psychiatric science of the day." *Id.*

108. *See Rennie*, 720 F.2d at 271 (Adams, J., concurring) "A constitutional standard which provided no protection beyond that of the tort of medical malpractice would be inappropriate for the involuntarily institutionalized mentally ill."); *see also id.* at 276 (Weis, J., concurring) ("I fear that the latitude the majority allows in 'professional judgment' jeopardizes adequate protection of a patient's constitutional rights.")

109. *Id.* at 269.

Initially, the *Bee* court appears to accept this broad definition of what constitutes professional judgment when it explains that the determination of whether an emergency exists "must be the product of professional judgment by appropriate medical authorities, applying accepted medical standards."[110] The *Bee* court, however, does not end its analysis at this point but instead goes on to say that the determination of whether an emergency exists requires professional judgment *which includes*:

> a balancing of the jail's concerns for the safety of its occupants against a detainee's interest in freedom from unwarranted antipsychotics. . . . It requires an evaluation in each case of all the relevant circumstances, including the nature and gravity of the safety threat, the characteristics of the individual involved, and the likely effects of particular drugs.[111]

The court further held that once an emergency has been determined to exist, the decision-maker must rule out the existence of less restrictive alternative before resorting to antipsychotic drugs.[112] Thus, in each instance where the state claims that an emergency warrants the forcible administration of antipsychotics, a medical professional must not only weigh the factors outlined above, but must also consider whether isolation of the individual or the use of less controversial tranquilizers would satisfy the state's interest in the safety of the jail.[113]

In effect, this more detailed definition of what constitutes an exercise of professional judgment merely allows a court to determine whether a state psychiatrist's decision to forcibly medicate an individual was, in fact, a substantial departure from accepted medical practices. Presumably, a state psychiatrist exercising professional judgment would not forcibly medicate an individual unless that psychiatrist first considered the extent of the danger posed by the individual, the characteristics of that individual, including any past history of psychotic disorders, the likely effects that antipsychotics will have, and the availability of less intrusive means of treatment. In reality, however, state psychiatrists frequently prescribe antipsychotic drugs for reasons wholly unrelated to an individual's medical needs.[114] The definition of professional judgment set out in

110. 744 F.2d at 1396. In so stating, the court cites to *Youngberg* and *Rennie*, where the "substantial departure" standard for professional judgment was used.

111. *Id.*

112. *Id.*

113. *Id.*

114. *See* Davis v. Hubbard, 506 F. Supp. 915, 926, where the court noted that the trial testimony "established that the prevalent use of psychotropic drugs is countertherapeutic and can be justified only for reasons other than treatment—namely, for the convenience of the staff and for punishment." *Id.* (footnote omitted); *see also*, Bomstein, *The Forcible Administration of Drugs to Prisoners and Mental Patients*, 9 CLEARINGHOUSE REV. 379, 387-88 (1975) (author argues that there are only three rationales for medication: treatment, control, or punishment, and that it is necessary to "pierce the veil" of treatment to disclose the true purpose of control or punishment); Sitnick, *supra*

Bee merely ensures that the legitimate medical needs of the individual underly a decision to forcibly medicate, and not other arguably professional considerations such as administrative convenience.[115]

The manner in which the *Bee* court defines professional judgment also redefines the burden of proof in right-to-refuse cases. Instead of placing on the plaintiff the considerable burden of demonstrating "substantial departure" from accepted norms, the *Bee* court places the burden on state psychiatrists to demonstrate that they *in fact* exercised professional judgment when deciding to forcibly medicate. Because the court required the defendants in *Bee* to demonstrate that their decision was the result of professional judgment, Bee's cause of action was able to survive the government's motion for summary judgment. Had Bee been required to show that a substantial issue of fact existed as to whether the decision to medicate him was a substantial departure from accepted practice, more than likely the Tenth Circuit would have affirmed the district court's grant of summary judgment for the defendants. In that situation, all that the state would need in support of its motion would be affadavits from other state psychiatrists that the forcible administration of antipsychotic drugs is standard practice in jails. When the right to refuse antipsychotics is measured by current psychiatric practices, that right becomes meaningless as long as state psychiatrists view the forcible administration of the drugs as acceptable.

Courts should consider more precise definitions of the professional judgment standard such as the one set out in *Bee* in all cases where individuals claim that they have been forcibly medicated with antipsychotic drugs. Courts should, however, be especially precise in defining what constitutes an exercise of professional judgment in the pre-trial detainment setting. The purpose behind a pre-trial detainee's incarceration is to ensure that person's presence at trial.[116] Unlike an involuntarily committed mental patient, there is no basis for presuming that a pre-trial detainee is mentally ill and in need of *any* kind of psychiatric treatment. A more precise definition of what constitutes professional judgment in forcibly medicating is therefore justified in the prison environment. One commentator explains that prison psychiatrists are, "first and foremost

note 10 at 386 ("language of treatment may simply provide a rhetorical justification for unlimited social control of individuals who are perceived to be dangerous"); Opton, *Psychiatric Violence Against Prisoners: When Therapy is Punishment*, 45 MISS. L.J. 605, 640 (1974) (purpose of most drugging is to keep prisoners quiet and docile).

115. *See Rennie*, 720 F.2d at 276 (Weis, J., concurring) ("A 'professional judgment' based primarily on administrative convenience or the purely economic interest of the state does not pass muster.").

116. Bell v. Wolfish, 441 U.S. 520, 534 n.15 (1978).

functionaries in the disciplinary power structure of the prison bureaucracy."[117] It is therefore necessary for courts to ensure that the decision to forcibly medicate a pre-trial detainee with antipsychotic drugs is the result of an exercise of professional judgment that takes into account the legitimate medical needs of the individual, the nature of the threat, the effect the drugs will have and any less intrusive means of handling the safety threat.

It is too soon to predict the impact that the *Bee* decision will have in right to refuse cases. To date, the only practical result of the decision is that it enables a pre-trial detainee to overcome a motion for summary judgment by making the existence of an emergency and the availability of less restrictive alternatives factual issues that preclude summary judgment. At least one court that addressed the issue of a pre-trial detainee's right to refuse antipsychotic drugs since *Bee* relied on the *Bee* court's analysis in denying the defendants' motion for summary judgment.[118] That court stated that summary judgment was inappropriate since, *inter alia*, the existence of an emergency at the time of the forced drugging was a disputed factual issue and the defendants had introduced no evidence regarding, "(1) a past record of manic, schizophrenic or other psychiatric condition indicating a risk to jail safety and security, or (2) the inadequacy of segregation, alternative drugs or other less restrictive alternatives . . . ."[119]

By enabling plaintiffs to get their constitutional claims to the finder of fact, the *Bee* court's refinement of the professional judgment standard clearly provides more meaningful protection for the right to refuse antipsychotic drugs. It is, however, as yet unclear whether the *Bee* standard will provide the same increased protection at trial. It is not unrealistic to assume that the trial of many right to refuse cases would consist of the word of the plaintiff against the word of a myriad of state professional employees. Though it is to the plaintiff's distinct advantage not to have to prove that the forced medication was a "substantial departure" from accepted norms, it is also unlikely that the plaintiff will be able to gather sufficient evidence to rebut the state's evidence that professional judgment, even in the manner required by *Bee*, was in fact exercised.

117. Opton, *supra* note 115 at 622; *see also*, Sitnick, *supra* note 10 at 388 ("Good medical facilities and fulltime psychiatrists are generally unavailable. Psychiatric decisions are necessarily made on the basis of information provided by a prison staff that is woefully inadequate.").

118. Hall v. Spraggins, No. 84 C 4098, slip op. (N.D. Ill. July 23, 1985).

119. *Id.* at 8.

CONCLUSION

The existence of an individual's right to refuse the forcible administration of antipsychotic drugs is gradually gaining general acceptance in the courts. Most courts identify the right to refuse as a fundamental liberty interest guaranteed by the due process clauses of the fifth and fourteenth amendments. Though courts are willing to recognize the existence of the right, they are not always willing to employ a standard of review that will closely scrutinize a state's decision to override an individual's right to refuse.

Oftentimes, courts employ a standard of review that defers completely to the professional judgment of state psychiatrists, while at the same time defining "professional judgment" as *any* decision by a professional that is not a substantial departure from generally accepted norms. In *Bee v. Greaves*, the Tenth Circuit set out a refined definition of the term "professional judgment" that serves to provide more meaningful protection of the right to refuse antipsychotic drugs. However, the true extent of the protection that *Bee* will provide remains to be seen.

BOOK REVIEW